

FCC MAIL SECTION

Before the
Federal Communications Commission
Washington, D.C. 20554
OCT 7 3 42 PM '92

MM Docket No. 92-62 ✓

In re Applications of

CRYSTAL CLEAR
COMMUNICATIONS, INC.

File No. BPH-901214MA

THE RADIO MINISTRIES
BOARD OF VICTORY
CHRISTIAN CENTER
ASSEMBLY OF GOD, INC.

File No. BPH-901217MJ

For Construction Permit for
New FM Station, Channel 240A,
Seelyville, Indiana

MEMORANDUM OPINION AND ORDER

Adopted: September 22, 1992; Released: October 7, 1992

By the Review Board: MARINO (Chairman), and
GREENE. Board Member ESBENSEN absent.

1. Crystal Clear Communications, Inc. (Crystal) appeals the dismissal of its application for failure to file a timely notice of appearance. See *Memorandum Opinion and Order* (Order), FCC 92M-657, released July 11, 1992, by Administrative Law Judge Frysiak (ALJ). An opposition was filed July 15, 1992 by the Radio Ministries Board of Victory. Since the facts in this case parallel those found in *LRB Broadcasting*, FCC 92R-78, adopted September 22, 1992, where we affirmed the ALJ's discretion in dismissing a similar applicant, we also affirm the dismissal Order in this case.

2. As in *LRB*, Crystal's application was consolidated for hearing with a competing applicant by a *Hearing Designation Order* (HDO), 7 FCC Rcd 2294, released April 13, 1992. Specific notice was given in the HDO, at para. 13, that to avail itself of the opportunity to be heard, an applicant "shall, pursuant to Section 1.221(c) of the Commission's rules, in person or by attorney, within 20 days of the mailing of the Order file with the Commission" a notice of appearance. Section 1.221(c) provides that if an applicant fails to demonstrate "good cause" for the late-filed appearance "the application will be dismissed with prejudice for failure to prosecute."

3. The HDO also specifically mandated that within five days after the date established for filing notices of appearance, the applicants shall serve upon the other parties that have filed notices of appearance the materials listed in: (a) the Standard Document Production Order (see Section 1.325(c)(1) of the Rules); and (b) the Standardized Integration Statement (see Section 1.325(c)(2) of the Rules). All parties were notified that, in accordance with the Commission's Procedural Reform Report and Order, *supra*, "Fail-

ure to serve the required materials may constitute a failure to prosecute, resulting in the dismissal of the application." HDO, para. 13.

4. Crystal's notice of appearance (NOA) was due to be filed May 4, 1992, and document productions and integration statements were due May 11, 1992. Crystal's NOA was not filed until May 18, 1992 (Appeal pp. 1-2), and the integration statement and the relevant documents were filed late, as in the *LRB* case, *supra*. See also Radio Ministries Opposition to Appeal, p. 3.

5. On May 20, 1992, Crystal's then counsel filed the following "Report," which tracks the "Report" in *LRB*:

On Saturday, May 16, 1992, counsel for Crystal Clear received a document entitled "Non-Delivery Notice" ("the notice") from the courier which services had been retained for timely delivery of a package to the office of the Secretary of the Commission on May 4, 1992. The package contained, *inter alia*, Crystal Clear's post Hearing Designation Order "Notice of Appearance". The notice showed that the package was being held at the Washington National Airport near Washington, D.C.

Counsel called the number listed on the notice for an explanation of the document, but could not get a response until Monday, May 18. From several phone conversations with courier personnel, it appears that the package was delivered to the Commission after 5:30 p.m., even though it was clearly marked to deliver before 5:30 p.m. Inexplicably at this point, the package has been held for two (2) weeks at the airport.

Crystal Clear's Notice of Appearance was served upon the Presiding Judge, other counsel, the Hearing Branch, and the Data Management Branch. Counsel requested that the package containing Crystal Clear's Notice of Appearance be delivered to the Commission immediately. Additional information is being sought by Crystal Clear as to this matter.

Crystal Clear further notes that prior to July 15, 1992, it properly paid its hearing fee, and filed a "Notice of Appearance and Payment of Hearing Fee" at that time. Moreover, it has filed a "Petition for Leave to Amend" and "Integration and Diversification Statement". Crystal Clear requests no relief in this pleading, but filed this Report to provide information[.]

6. A motion to accept late notice of appearance was filed by Crystal on May 26, 1992, urging that Section 1.221(c) was sufficiently flexible to permit acceptance because of the circumstances. The competing applicant moved to dismiss Crystal's application, noting that Crystal had also failed to submit the documents and integration statement required by the Commission's rules in a timely fashion. See para. 4, *supra*. In the ALJ's dismissal Order, *supra*, at paras. 4 and 5, he held that:

The motion to accept the late filed notice of appearance must be denied. Crystal Clear does not have adequate justification for acceptance. Crystal Clear has not identified the courier, nor has it submitted any documentation to corroborate its excuse. In its *Public Notice*, 58 RR 2d 1706 (1985), the Commis-

sion indicated that, in order to be considered, untimely filings must have been caused by a "calamity of a widespread nature that even the best of planning could not have avoided." No such circumstance exists here.

Inasmuch as Crystal Clear's notice of appearance has been untimely filed, its application must be dismissed pursuant to Section 1.221(c).

7. Crystal's new counsel argues that the ALJ erred in relying on the reasoning in the Commission's *Public Notice, supra*, which involved the cut-off rules, and that "[t]he strict standard applicable to the cut-off dates is wholly inapplicable here." Appeal, pp. 2-3. We need not decide whether the instant *Public Notice* is applicable to the new filing requirements because the facts here are identical to those in *LRB*, where we held for reasons there fully articulated, that the applicant had not demonstrated good cause for its late-filed notice of appearance and other defaults. In any event, the Commission has now also mandated "strict and specific deadlines" for filings in comparative cases so that the Commission's prior reasoning is not wholly inapplicable here.

8. ACCORDINGLY, IT IS ORDERED, That the Appeal filed July 8, 1992 by Crystal Communications, Inc. IS DENIED; and that the Motion to Dismiss Notice of Appeal filed June 29, 1992, and Request for Leave to file Appeal Out of Time ARE DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Joseph A. Marino
Chairman, Review Board